



**Kathuri v Waithaka (Civil Appeal E274 of 2023)  
[2024] KEHC 8657 (KLR) (Civ) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8657 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E274 OF 2023**

**AC BETT, J**

**JULY 12, 2024**

**BETWEEN**

**MICHAEL GAKURU KATHURI ..... APPLICANT**

**AND**

**PETER NJUGUNA WAITHAKA ..... RESPONDENT**

**RULING**

1. The applicant lodged a memorandum of appeal dated 5<sup>th</sup> April 2023 on 11<sup>th</sup> April 2023. It was an appeal against a finding dated 21<sup>st</sup> October 2022 in which the Trial Magistrate had dismissed the applicant's application to set aside an *ex-parte* judgement. The appeal was filed out of time and without the leave of the court.
2. By a Notice of Motion dated 5<sup>th</sup> April 2023, the applicant sought the following orders: -
  - 1) An order hereby issues enlarging time for the Appellant to file his appeal against the ruling in Chief Magistrate Civil Case No. 5041 of 2017.
  - 2) The Record of Appeal filed herein be deemed as properly filed.
  - 3) The costs of this application shall abide the outcome of the appeal.
3. The grounds for the application were that the delay in filing the appeal was attributed to delays in the Chief Magistrate's registry which failed to supply certified copies of the ruling and the typed proceedings on time. The applicant attached copies of correspondence written on diverse dates in follow-up of the ruling and proceedings. He also furnished the court with a certificate of delay dated 15<sup>th</sup> February 2023.



4. The application was opposed. The respondent filed grounds of opposition in which he stated that the appellant had failed to demonstrate good and sufficient cause for his failure to file appeal within the stipulated time. It is his case that there are no sufficient grounds for the court to enlarge time.
5. The respondent also said that the application was incompetent, misconceived and an abuse of the process of the court. It was his further grounds of opposition that the application is intended to delay, frustrate and/or prevent the respondent from enjoying the fruits of his judgement as the intended appeal had no chances of success.
6. Directions were taken in which the parties agreed to dispose the application by way of written submissions.
7. It is the appellant's submissions that he has met the threshold for the enlargement of time. He relies on the case of *Mbukani Services Ltd And Another - v- Esther Nzilani Muindi* [2022] eKLR. According to him, the court should generally exercise their discretion in favor of applicants seeking enlargement of time to enable them to appeal where the delay is short. Further reliance is made on the case of *Sylvester Wanje Bomu - v- Kenya Power And Lighting Co. Ltd* [2018] eKLR where the court granted leave to an appellant whose delay in filing appeal was occasioned by the court's failure to furnish the appellant with both the judgement and typed proceedings of the lower court on time until after time to file appeal had lapsed thereby leading to a delay of twenty days. The court had said that such a delay could not be said to be inordinate. It is the applicant's submissions that they made diligent efforts as shown by the annexed copies of letters to the courts, to follow up on the typed proceedings and certified copy of the ruling.
8. The respondent's submissions are that the application lacks merit. He submits that the time lapse between 15<sup>th</sup> February 2023 when the applicant's advocate received the proceedings and ruling, and 5<sup>th</sup> April 2023 when they filed the present application has not been explained. The respondent relies on the case of *Paul Njage Njeru - v- Karija K. Mugambi* [2021]eKLR where the court was of the view that the filing of a memorandum of appeal does not require typed and certified copies of proceedings. Also cited is the case of *Leonard Mungai Njoroge - V- Nancy Mugure Njugu* Appeal No. 6 OF 2020 in which the court stated that a memorandum of appeal does not require proceedings.
9. It is the respondent's submissions that the appellant has not laid out sufficient grounds to warrant the enlargement of time. He relies on the case of *Omar Shurie - v- Marian Rashe Yasar* [2020] eKLR where the court held:-

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters the court takes into account in deciding whether or not to grant an extension of time are: first the length of delay, secondly, the reason for the delay, thirdly (possibly) the chance of the appeal succeeding if the leave to appeal is granted, and fourthly, the degree of prejudice to the respondent if the application is granted.”

10. Section 79G of the *Civil Procedure Act* grants power to the court to enlarge time for filing appeal. It provides that: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.



Provided that an appeal may be admitted out of time if the appellant satisfies this court that he had good and sufficient cause for not filing the appeal in time.”

11. The appellant brought the application for extension of time five months after the impugned ruling was delivered. He blames the delay on the courts which he has demonstrated issued him with the typed proceedings and certified copy of the ruling on 15<sup>th</sup> February 2023. He filed the present application on 5<sup>th</sup> April 2023. This court is of the considered view that the failure by the courts to furnish the appellant with a certified copy of the ruling and typed proceedings within the requisite period does not constitute sufficient cause to extend time for filing appeal. The reason is that both said documents are not necessary at the time of filing of appeal in the High Court.
12. The question before the court is whether the application has merit. In the case of *Wachira Karani - v- Bildad Wachira* [2016] eKLR the court defined sufficient cause by quoting the Supreme Court of India in the case of *Parimal V Veena* where the court sated: -

“‘sufficient cause’ is an expression which has been used in a large number of statutes. The meaning of the word ‘sufficient’ is ‘adequate’ or ‘enough’, in as much as they be necessary to answer the purpose intended. Therefore, the word ‘sufficient’ embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances in a case duly examined from the view point of a reasonable standard of a curious man. In this context ‘sufficient cause’ means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting negligently” or “remaining inactive”. However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises its discretion, it has to be exercised judiciously.”
13. In applying the *Parimal - v- Veena* case, the court stated as follows: -

“The court in the above case added that while deciding whether there is sufficient cause or nor, the court must bear in mind the object of doing substantial justice to all parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated in the basis of the judgement before it. The test to be applied as whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of facts and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by sufficient cause.”
14. The applicant filed the present application 49 days after receiving the proceedings from the court. Neither the applicant nor his advocate have proffered an explanation for this subsequent delay. Clearly the applicant would want the court to turn a blind eye to this lapse. Since the applicant received the proceedings and ruling on 15<sup>th</sup> February 2023, he was under an obligation to file an application for enlargement of time within a reasonable period bearing in mind that four months had already lapsed from the time the impugned ruling was delivered. Can 49 days delay be said to be reasonable in this context? I think not. Taking into account the fact that the statutory time for filing appeal is 30 days, the



49 days delay cannot be compared with the 9 days and 20 days delay in the cases cited by the applicant in his submissions and which delays were adequately explained by the applicants herein.

15. The applicant expects the court to exercise its discretion in his favour. It is incumbent upon him to demonstrate good faith. He cannot fail to explain the lapses on his part and expect the court to grant him leave simply because he has compiled and filed a record of appeal. He needs to show sufficient cause. The Supreme Court has held that extension of time is not a right of a party, but an equitable remedy. There are two principles of equity applicable herein, that “he who comes to equity must come with clean hands”, and “justice delayed is justice denied”. The applicant’s application does not satisfy the said two principles.
16. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat - v- Iebc And 7 Others* [2014] eKLR enunciated the principles applicable in an application for extension of time to appeal and stated as follows: -
  - “The underlying principles court should consider in exercise of such discretion include: -
  1. Extension of time is not right of any party, it is an equitable remedy that is only available to a deserving party at the discretion of the court.
  2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court.
  3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis.
  4. Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
  5. Whether there will be any prejudice suffered by the Respondent if the extension is granted.
  6. Whether the application is brought without undue delay.”
17. In this instant, the applicant has not explained to the satisfaction of this court the reason for the delay in filing the memorandum of appeal within 30 days as envisaged by the rules. Certified copies of the ruling and typed proceedings are not a prerequisite to the filing of an appeal before the High Court and so absence of the said documents cannot constitute a sufficient reason for failure to file a memorandum of appeal within time. Moreover, even after being furnished with the said documents, the applicant took a record 49 days before filing the application for enlargement of time. The delay was never accounted for. The applicant has therefore failed to lay a basis, to the satisfaction of the court, upon which extension can be granted. I find that the delay in lodging this application was inordinate.
18. The applicant asserts that he has an arguable appeal with overwhelming chances of success. Whether an appeal is arguable or not is only one of the factors to be taken into consideration in deciding whether to grant an extension of time.
19. The other issue to be considered by the court is whether the respondent would suffer prejudice. The intended appeal arises from a suit that was filed in 2017 and judgement delivered in 2018. The appellant filed an application to set aside the said judgement in 2022. Certainly, the respondent stands to suffer prejudice by the inordinate and unexplained delay herein.
20. For all the above reasons, I find and hold that the applicant’s application dated 5<sup>th</sup> April 2023 lacks merit and is hereby dismissed. The memorandum of appeal dated 5<sup>th</sup> April 2023 is therefore struck out. The applicant shall bear the costs of this application.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 12<sup>TH</sup> DAY OF JULY 2024.**

**A. C. BETT**

**JUDGE**

**In the presence of:**

Mr. Nyairo holding brief for E. K. Njagi for the appellant/applicant

Ms. Mose for the respondent

Court Assistant: Polycap Mukabwa

